



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

Coram: Hon. D. K. Kemei – J

**CIVIL CASE NO. 10 OF 2020**

EVANSON KARIUKI KAMAU.....1<sup>ST</sup> PLAINTIFF  
STANLEY MUGAISI MBEHERO.....2<sup>ND</sup> PLAINTIFF/APPLICANT  
MARK EDDY KARUNGO.....3<sup>RD</sup> PLAINTIFF  
JULIANNA OGGEMA.....4<sup>TH</sup> PLAINTIFF  
HAGEN BERNARD FRANCIS MUTAMBI.....5<sup>TH</sup> PLAINTIFF  
JANE OMWAMI.....6<sup>TH</sup> PLAINTIFF  
ERIC KANGE'THE.....7<sup>TH</sup> PLAINTIFF/APPLICANT  
MARTIN KIMATHI WERU (Suing on behalf of And as a Donee of a Power of  
Attorney from Josephine Kambura Weru).....8<sup>TH</sup> PLAINTIFF/APPLICANT  
LUCY WANJIRU LAU-BIGHAM.....9<sup>TH</sup> PLAINTIFF/APPLICANT  
CECILIA MWIKALI LAU.....10<sup>TH</sup> PLAINTIFF/APPLICANT  
JOHN BOSCO WAINAINA LAU.....11<sup>TH</sup> PLAINTIFF/APPLICANT  
ROBERT GITUMBO GATERU.....12<sup>TH</sup> PLAINTIFF/APPLICANT  
FAITH WATERE KAHONGE.....13<sup>TH</sup> PLAINTIFF/APPLICANT  
CAROLINE WAIRIMU KIHARA.....14<sup>TH</sup> PLAINTIFF/APPLICANT  
ALICE AUMA AGORO-MAJANI.....15<sup>TH</sup> PLAINTIFF/APPLICANT

**VERSUS**

TAMARIND MEADOWS LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT  
TAMARIND PROPERTIES LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT

**RULING**

1. The Plaintiffs/Applicants filed a notice of motion dated 8<sup>th</sup> May 2021 brought pursuant to the provisions of section 18(1) of the Arbitration Act, section 1A, 1B, 3A of the Civil Procedure Act, Order 40 rule 1 of the Civil Procedure Rules seeking the following orders: -

**a) Spent**

**b) THAT pending hearing and determination of the Application interpartes, a temporary injunction does issue restraining the Defendants, whether by themselves, their employees, servants or agents or otherwise howsoever from evicting, instituting eviction proceedings, distressing, proclaiming and/or attaching the applicants 2<sup>nd</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> Applicants/Claimants in the Arbitration assets and/or acting on the letters dated 19<sup>th</sup> April 2021 and 27<sup>th</sup> April 2021.**

**c) THAT pending hearing and determination of the arbitration proceedings, a temporary injunction does issue restraining the Defendants, whether by themselves, their employees, servants or agents or otherwise whomsoever from evicting, instituting eviction proceedings, distressing, proclaiming and/or attaching the applicants'/Claimants' assets and/or acting on the letters dated 19<sup>th</sup> April 2021 and 27<sup>th</sup> April 2021.**

**d) THAT costs of the application be paid provided.**

2. The application is supported by the affidavit of Kimberly Kwesiga, the Applicants advocate. The application is based on grounds *inter alia*; that the Arbitrator referred this application to this Honourable court by dint of section 18(2) of Arbitration Act in Order for Directions NO.3.; this court in its ruling of 29<sup>th</sup> September 2020 (Civil Case No.10 of 202;Evanson Kariuki& 14 Others vs Tamarind Meadows Ltd & Another) ordered all proceedings and orders in this suit be stayed and dispute referred to Arbitration as provided under Clause 21 of the Sale/Purchase Agreement entered into by the parties; the parties have filed and exchanged pleadings and that the Arbitrator has requested the assistance of the court in determining this application and hence in the interest of justice the court do grant the orders sought herein to preserve the status quo; the Tribunal under section 18 of the Arbitration Act has the power to make such a request under subsection 2 to the High court and the court for purposes of arbitral proceedings have the same powers to make orders which are conferred on the tribunal; the validity of the license agreements relied on by the Respondents to distress and/or evict the Applicants are subjects to be determined in arbitration; the validity and legality of the license fees as to whether or not they are subject to Distress for Rent Act is subject to determination in the arbitral proceedings; if the orders sought herein are not granted the Arbitration proceedings will be rendered nugatory and the Applicants will suffer irreparable damage and harm in the assets that are proclaimed and sold by auctioneers; Clause 21 (22.5) of the Sale Agreement provides for parties to seek Preliminary reliefs pending the decision or award of the arbitrator; the Respondents have purportedly terminated the licence agreements and threatened to evict the 2<sup>nd</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Claimants in the arbitration from the suit properties and further threatened to attach their assets to recover the licence fees which is subject of this claim and dispute that is to be determined through arbitration; the Defendants will not suffer any prejudice if the orders sought are granted as the same can be compensated by an award of costs and damages; the Respondents advocate not on record herein despite an earlier order of stay of proceedings have terminated licence agreements with some of the claimants herein; there is a high probability and an immediate danger that the respondents will distress, proclaim and institute eviction proceedings rendering the applicants claim nugatory and leading them to suffer irreparable harm; the orders sought herein are meant to preserve the status quo and failure to grant them will invite the Defendants to involve auctioneers who are not parties in the arbitration proceedings thus jeopardizing the arbitration proceeding and it is in the interest of justice that this court determine the matter conclusively and justiciably.

3. It is the applicants' case that the 1<sup>st</sup> Respondent through its advocate who is not on record, the firm of Owaga & Associates has threatened to institute eviction proceedings, proclaim and attach properties in the suit premises to recover licence fees. It is further the applicants' case that as a result of the threats from the Respondents he filed the application dated 28<sup>th</sup> April 2021 was filed to protect the Applicants from eviction and proclamation of their assets but the arbitrator referred the application to this court by dint of section 18(2) of the Arbitration Act. Finally, it was the applicants' case that the orders sought herein should be granted lest the Applicants shall suffer irreparable damage and unjustly enrich the Respondents.

4. In response, the Respondents through **Robert Darby**, a shareholder and a member of the board of directors of the 1<sup>st</sup> Defendant deponed vide a replying affidavit dated 17.05.2021 in which he adopted the contents of the affidavit filed before the Arbitral tribunal on 5.05.2021 and annexed it as RD-1. In the said annexure, he deposes that the application is fraudulent because;

**1) the Honourable court lacks jurisdiction to entertain the said application;**

**2) the applicants are guilty of non-disclosure;**

**3) the application is designed to revive orders which were made ex-parte by the High Court in Machakos and stayed on 17.06.2020 by this court;**

**4) the obligation to pay license fees is created by a license agreement entered into by each of the house buyers;**

**5) the function of the court is to enforce contracts which the parties have made and not to amend them at the instance of the one who might think that he made a bad bargain;**

**6) The license agreement binds the claimants just as the sale agreement does;**

**7) The applicant's claim that they ought to live in the house without paying license fees whilst the 1<sup>st</sup> defendant is paying interest on the money used to construct the house is outrageous and contrary to the agreement made;**

5. The Director deponed that the proper forum for seeking an interim relief is the Court of Appeal as it is seized of the matter and he relied on the case of **Board of Governors, Moi High School Kabarak & another vs Malcolm Bell [2013]** and further stated that the circumstances of the case do not permit grant of an injunction sought by some license defaulter on behalf of all claimants. He further relied on the case of **Lemita Ole Lemein vs Attorney General** on the issue of jurisdiction, that once the court concludes that it has no jurisdiction, then it downs its tools. He also stated that the application had not met the threshold for the requirements of pleadings as it does not indicate the properties covered by the orders sought. He opines that there are two contracts for sale of land, a class of those who have paid the license fees and those who have not paid the fees and that the Applicants have only attached demand letters sent to Mr. Robert Gitumbo Gateru and Mr. Stanley Mugaisi and wondered why they are seeking interim relief in this court after they have avoided seeking it in the court of Appeal where they are respondents.

6. The Director deponed that the demand letters were sent to some of the plaintiffs on 19<sup>th</sup> April and 27<sup>th</sup> April 2021 respectively and who have since discussed the matter and reached an agreement with the defendants on how the license fees in arrears of Kshs. 260,000.00/- are to be settled. The agreement is that 2<sup>nd</sup> Plaintiff will vacate his house which will be rented out and the proceeds shared 50:50 until the final decision of the Court of Appeal or the arbitrator is rendered. Further, that the house of the 8<sup>th</sup> Plaintiff is empty and will be repossessed at the end of the arbitration. He stated that he has not terminated any sale agreement with any of the claimants or plaintiffs in this case. He deposed that the 7<sup>th</sup> Plaintiff vacated the premises when he was in arrears of Kshs. 226,320.00/- and no demand letter was sent to him; that they did not plan to repossess the house of the 15<sup>th</sup> Plaintiff whom he claims has paid 87% of the purchase price. He also referred to a 30<sup>th</sup> Claimant, Mr. Mathew Tago whom he claims is a trespasser.

7. The application was canvassed by way of written submissions. The applicants filed submissions dated 23<sup>rd</sup> May 2021 in which they rely on the 17 grounds upon which the application is based and the supporting affidavit of Kimberly Kwesiga Advocate and the annexed application dated 28<sup>th</sup> April 2021 together with the supporting affidavit of Robert Gitumbo Gateru and Stanley Mugaisi Mbehero. The Applicants submitted that the court staying the proceedings and referring the matter to arbitration vide its ruling dated 29<sup>th</sup> September 2020 was a supervisory role that is enshrined in Article 159(2) of the Constitution. Further, that section 26(4) of the High Court (Organization and Administration) Act, 2015 gives this court an obligation to ensure any alternative dispute resolutions mechanism are fully exhausted. According to the Applicants, the court performs a supervisory role until the arbitration proceedings are concluded. Reliance has been placed on the case of **Republic vs County Land Registrar Kisii County & 2 Ors, Ex parte Nora Bochaberi Oruochi [2018] eKLR** and **Skoda Export Ltd vs Tamoli East Africa Ltd [2014] eKLR**. Based on the court authorities, the Applicants submitted that the court has jurisdiction and competent authority to hear the application and grant orders sought therein.

8. It is urged by the Applicants that the court has jurisdiction and authority to grant interim measures of protection pending and during the course of arbitration proceedings. Reliance has been placed on the case of **Safaricom Limited vs Ocean View Beach Hotel Limited & 2 Ors. [2010] eKLR** where principles were set out for the court to consider when entertaining an application of this nature. The first principle is whether there is existence of an arbitration agreement. The Applicants submitted that there is no dispute on the existence of an agreement as ascertained by court in its ruling dated 29<sup>th</sup> September 2020. The second principle is whether the subject matter of the arbitration is under threat. The Applicants submitted that the license fees are the subject matter of the arbitration proceedings hence under threat of dissipation and if the orders sought are not granted the Applicants will suffer irreparable loss.

9. According to the Applicants, the Respondents have on diverse dates taken adverse and prejudicial actions that threaten the subject matter of arbitration. The firm of Owaga & Associates Advocates on behalf of the Respondents issued instructions to Moran Auctioneers who served a distress for rent proclamation notices on diverse dates upon the 13<sup>th</sup> and 15<sup>th</sup> Claimants in the Arbitration proceedings. On 26<sup>th</sup> January 2021 the Respondents terminated the licence agreement and repossessed the house of the 7<sup>th</sup> Applicant in this suit and arbitration proceedings. On 19<sup>th</sup> April 2021, the firm of Owaga & Associates Advocates issued a notice of termination of licence to the 13<sup>th</sup> Applicant and 10<sup>th</sup> Claimant in the Arbitration proceedings and threatened to proclaim assets and institute eviction proceedings. On 27<sup>th</sup> April 2021, the firm of Owaga & Associates advocates issued a notice of termination of licence to the 2<sup>nd</sup> Applicant herein and Claimant in arbitration proceedings and threatened to proclaim assets and institute eviction proceedings. Lastly on 18<sup>th</sup> May 202, the firm of Owaga & Associates Advocates issued a notice of termination of licence to the 13<sup>th</sup> and 11<sup>th</sup> Claimants in the arbitration proceedings.

10. The Applicants submitted that the use of auctioneers will result in irreparable harm and the threats of instituting eviction proceedings disregards the stay of all proceedings orders issued by the court on 29<sup>th</sup> September 2020. According to the Applicants, if the interim measures are issued by the Tribunal, the orders issued will not be affective against the auctioneers who are not privy in the arbitration proceedings, but the court in its supervisory role can do so authoritatively. Reliance has been place on the case of **Safaricom Limited vs Ocean View Beach Hotel & 2 Ors(supra)** in regard to section 7 of the Arbitration Act that allows court to issue interim measures of protection.

11. The Applicants submitted that the court should grant the interim reliefs sought in the application to subsist during the arbitration proceedings until the arbitrator makes an award as there is constant threat of the Respondents using the auctioneers.

12. The Defendants/ Respondents filed submissions dated 31<sup>st</sup> of May 2021 in which they opined that the application is an abuse of the court process and should be struck out as it is based on deceptions and the applicant's own wrongs. That the Plaintiffs/ Applicants did not disclose to the court that a few of them had disputes and agreement touching on payment of license fees and the same was agreed upon by each house buyer. They submitted that the Plaintiffs/ Applicants did not inform the court that the persons to whom the letters were written had reached settlement and agreement with the 1<sup>st</sup> Defendant/Respondent on the outstanding arrears. That the function of courts is to enforce contracts between parties and not to amend them at the instance of one who might think that they have made a bad bargain. Further, that they are seeking to be unjustly enriched while living in a house whose purchase price had not been paid and whose construction costs continue to attract interest while paying nothing. Therefore, the application to stay in the house without paying interest on the money used to construct the house is outrageous. They relied on the cases of **Uhuru Highway Development Company Limited & Others vs the Central Bank of Kenya, & Others, Nairobi Civil Appeal No. 126 of 1995, Standard Resource Group Limited Vs. Attorney General & 2 others [2016] eKLR, Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker group) -vs- County Government of Nairobi [2019] eKLR, Civil Suit No. 2382 of 1999 Kigwe Service Station Limited & Another vs Agip (K) Limited, Airtel Networks Kenya Limited vs Nyutu**

*Agrovat Limited [2011] Eklr, Nabro Properties Limited –vs- Sky Structures Limited [2002] Vol 2 KLR 299, Chemilil Limited vs Mokongi [1967] EA, Abraham Lenauia Lenkon vs Charles Katekeyo Nkaru [2016]eKLR* to support their position.

13. They further submitted that the contents of the affidavit had not been controverted by the Plaintiffs/ Applicants. They went on to submit that the Plaintiffs/Applicants are engaging the court in an academic exercise because no real dispute exists and that they are just caught up in the doctrine of mootness.

14. They submitted that if the application is allowed then they will suffer substantial loss and untold hardship as the 1<sup>st</sup> Defendant is servicing loans from the Kenya commercial bank that was used to construct the properties and they rely on the license fees to repay the loan. Further, while relying on the case of *Giella vs Cassman Brown*, counsel submitted that the Plaintiffs/Applicants had not established a prima facie case with a probability of success and that irreparable injury will be suffered because there is no dispute. Nonetheless, that the balance of convenience favours refusal of the injunction and asked the court to balance the interest of the parties. He also relied on the case of *E.A. Industries vs Trufoods [1972] EA 420*.

15. I have considered the application, the rival affidavits and the submissions of the parties and find that the issue for determination is *whether the Plaintiff/Applicant is entitled to the orders sought*.

16. I note that this matter was referred to arbitration in line with Article 159 (2) of the Constitution of Kenya, 2010 in a bid to settle the matter out of court and also due to the arbitration clause in the agreement between the parties.

17. This court is clothed with the jurisdiction to give interim orders pending determination of a suit as provided for under *section 7 of the Arbitration Act*, that:-

***1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.***

***(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application***

18. Interim measures of protection or provisional reliefs are stated by *Jean-Francois Poudret & Sebastien Besson* in the 2nd edition of their treatise *“Comparative Law of International Arbitration”* (*Sweet & Maxwell, London 2007, p.519*) to be measures;

***“...to preserve a factual or legal situation so as to safeguard rights recognition which is sought elsewhere from the court having jurisdiction as to the substance of the matter”.***

19. The *Blacks' Law Dictionary, 8th edition* defines “Interim Measure of protection” as:-

***“An Intentional tribunal order to prevent a litigant from prejudicing the final outcome of a law suit by arbitrating action before judgement has been reached. This measure is comparable to a temporary injunction in national law.”***

20. In the case of *NCC International AB vs Alliance Concrete Singapore Pte Ltd [2008]5 LRC 187*, the court provided that;

***“The granting of an interim measure of protection or injunction pending the determination of an arbitral reference was a discretionary measure that should be exercised cautiously so as not to usurp the role of the arbitral tribunal and that it could decline to grant such orders where an arbitration tribunal had concurrent jurisdiction to make such orders. The court should therefore come in under very exceptional circumstances”.***

21. The landmark case of *Safaricom Limited vs Ocean View Beach Limited & 2 Others [2010] eKLR* on interim measures of protection pending Arbitration proceedings is relevant and which held as follows;

***“Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-***

***1. The existence of an arbitration agreement.***

***2. Whether the subject matter of arbitration is under threat.***

***3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?***

***4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal’s decision making power as intended by the parties?”***

22. I therefore agree with the Applicants to the extent that this court has jurisdiction to grant interim reliefs to parties pending determination of the arbitration proceedings. It is not in dispute that there is an arbitration clause/agreement between the parties on the first realm for granting interim reliefs.

23. On the second realm, I note that Applicants are seeking injunctive orders so as to protect the subject matter of the suit while the Respondents claim that the subject matter herein is license fees, that was part of a different agreement between the parties. I also note that there are orders issued by this court on 17.06.2020, which orders are yet to be vacated. The said orders were to the effect that;

*a. A temporary injunction was issued restraining the Respondents/Defendants wither by themselves, agents, servants, employees and/ or persons acting under their instructions from in any way collecting any licence fees or any form of monies in relation to house numbers 52,56,61,50,33,54,29,3,12,55,19,68 on Land Reference No. 18469.*

*b. A temporary injunction was issued restraining the Respondents/Defendants wither by themselves, agents, servants, employees and/ or persons acting under their instructions from interfering with the Applicant's /Plaintiffs quiet enjoyment of the property*

*c. ....*

24. In the South African case of *Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another CCT 19/11 [2015] ZACC 10* the court observed that:-

***“The rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”***

25. The said orders of 17.06.2020 have never been vacated and thus it comes as a surprise to this court that the Plaintiff is seeking similar orders as the above and that the Defendants/ Respondents are mischievously trying to circumvent the orders of this court that were very clear especially in terms of prayer 1 and 2.

26. While I agree with the Respondents that the correct legal principle is that parties must be held to their bargain and the court ought not relieve or burden either party to a bargain and that courts cannot re-write contracts for parties, I do not agree that in seeking an interim or provisional relief the Applicants are seeking to have the court redraw the contract for the parties. In any event, the parties are before the arbitral tribunal and who have been referred to this court by the said tribunal for interim relief pursuant to section 18(2) of the Arbitration Act.

27. In deciding whether to grant interim reliefs, this court is guided by the principles laid down in *Giella Versus Cassman Brown (1973) EA 358* and as was reiterated in the case of *Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR* where the Court of Appeal held that;

***“In an interlocutory injunction application the applicant has to satisfy the triple requirements to;***

***a. establishes his case only at a prima facie level,***

***b. demonstrates irreparable injury if a temporary injunction is not granted and***

***c. by showing that the balance of convenience is in his favour.***

***These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.***

28. This court notes that the parties cited in the court order dated 17.06.2020 and the nature of those orders was injunctive reliefs to protect the substratum of the suit pending the determination of the arbitration, this was including but not limited to *license fees and any other monies* that the Respondents purport to claim from the Applicants. This court finds that the Applicant has satisfied the three conditions for grant of an interim injunction. However, it is not in order for the court to grant orders that it had already issued. It is deemed that parties are aware of those orders that had been issued pending determination of the arbitration proceedings after this court stayed proceedings to await a determination of the arbitral proceedings. This court has now been called upon to act after the parties were referred here by the arbitral tribunal and therefore must listen to the parties. It is necessary to protect the subject of the dispute as the parties engage each other in the arbitral tribunal. There is likelihood of prejudice to be suffered by the applicants if the defendants are not restrained. As the parties have agreed to ventilate their grievances at the arbitral tribunal pursuant to the agreements, it is only fair and just that each of them should not take any precipitate action to the prejudice of the other. They should hold their horses and wait for a determination of the arbitral tribunal. Hence, there is need to preserve the subject of the dispute pending the arbitrator's verdict. It must be noted that this court has been requested by the arbitrator to hear the applicants' application and hence the court is now wearing the arbitrator's shoes only with respect to the latest application and must therefore see the bigger picture namely to ensure the subject of the dispute is not dissipated before its determination. There is no prejudice suffered by the defendants since the agreements entered into did provide that parties should go to arbitration in the event of a dispute and that once such a move is taken, it behoves upon the parties not to interfere with the status quo pending determination

of the said dispute. It will be a sad state of affairs if one party to the dispute in the arbitration proceedings takes precipitate action while the other is powerless and patiently waiting for a determination by the tribunal. There must be some order to ensure that parties stick thereby as they wait the tribunal to determine the dispute.

29. In light of the foregoing, it is my finding that the Applicants have established a prima facie case to justify a grant of interim measure pending determination of the arbitral proceedings. The balance of convenience tilts in favour of the Applicants. The plaintiff's application dated 8/5/2021 is allowed in terms of prayer (c) thereof. Each party to bear their own costs.

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 10TH DAY OF JUNE, 2021.**

**D. K. KEMEI**

**JUDGE**